No. 877

In the Supreme Court of the United States

OCTOBER TERM, 1958

A. PHILIP WOOLFSON, PETITIONER

v.

LESTER T. DOYLE, AS TRUSTEE IN REORGANIZATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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OPINIONS BELOW

The *per curiam* order of the court of appeals (Pet. 2) is not reported. The opinion of the district court (R. 56a–64a) is not reported.

JURISDICTION

The order of the court of appeals was entered on April 10, 1959 (Pet. 2). The petition for a writ of certiorari was filed on April 29, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 178 of Chapter X of the Bankruptcy Act, which requires that plans of reorganiza-

tion of intrastate public utilities be approved by the state commissions having regulatory jurisdiction over them, deprives the federal courts of bankruptcy jurisdiction over intrastate public utilities not subject to state regulation.

2. Whether petitioner was entitled to an order requiring the Securities and Exchange Commission to institute criminal proceedings against the New York Stock Exchange.

3. Whether common stockholders were given adequate notice of the certain stages in the reorganization proceeding.

STATUTES INVOLVED

Section 178 of Chapter X of the Bankruptcy Act, as amended (52 Stat. 891, 11 U.S.C. 578), provides:

> In case a debtor is a public utility corporation, wholly intrastate, subject to the jurisdiction of a State commission having regulatory jurisdiction over such debtor, a plan shall not be approved, as provided in section 174 of this Act, unless such State commission shall have first certified its approval of such plan as to the public interest therein and the fairness thereof. Upon its failure to certify its approval or disapproval within thirty days, or such further time as the court may prescribe, after the submission of the plan to it, as provided in section 177 of this Act, the public interest shall, for the purposes of such approval and of the confirmation of the plan, not be deemed to be affected by the plan.

Section 21(e) of the Securities Exchange Act of 1934 (48 Stat. 899, 15 U.S.C. 78u(e)) provides:

(e) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule or regulation thereunder, it may in its discretion bring an action in the proper district court of the United States, the Supreme Court of the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this title.

STATEMENT

Petitioner is a common stockholder of Third Avenue Transit Corporation, a company which has been in reorganization under Chapter X of the Bankruptcy Act since 1949. Under the plan of reorganization which has been approved, confirmed and consummated, no participation was accorded the stock of the debtor, since there were insufficient assets fully to compensate its junior creditors. Petitioner previously had appealed from orders of the district court approving and confirming the plan and refusing to set aside an order adjudging the debtor insolvent. That appeal was based on the ground, *inter alia*, that there was lack of adequate notice of the finding of insolvency. The orders of the district court were affirmed. *Woolfson* v.

Doyle, 238 F. 2d 665, certiorari denied, 352 U.S. 1031, rehearing denied, 353 U.S. 931. Thereafter petitioner moved in the reorganization court (1) to vacate an order directing consummation of the Joint Plan of Reorganization and to reopen the proceedings or, in the alternative, to modify the order confirming the Joint Plan of Reorganization; (2) to vacate the order awarding final allowances; and (3) to compel the Securities and Exchange Commission to institute criminal proceedings against the New York Stock Exchange for alleged noncompliance with the Commission's delisting rules. The district court denied the motions (R. 65a–66a), and the court of appeals dismissed petitioner's appeal, stating that the grounds thereof were "utterly lacking in merit" (Pet. 2).

ARGUMENT

1. Petitioner contends (Pet. 6–11) that, by virtue of an amendment to the Public Service Law of New York in 1950,[1] the New York Public Service Commission was divested of any regulatory jurisdiction over the debtor. From this premise petitioner concludes that the district court was deprived of further jurisdiction with respect to the reorganization of the debtor, a public utility corporation, owing to the provisions of Section 178 of Chapter X of the Bankruptcy Act (*supra*, p. 2). Even if, contrary to the express holding of the district court (R. 58a–60a), petitioner's premise were valid, the conclusion would nevertheless be clearly erroneous. Section 178 merely

[1] Section 5-d, Public Service Law, Laws of 1950, Chapter 163, as amended by Laws of 1953, Chapter 618.

provides that a reorganization plan of an intrastate utility is in effect subject to veto by a state regulatory commission having jurisdiction over the utility. Where the prescribed conditions do not exist, Section 178 is inapplicable. There is nothing in the language or the legislative history of this section to indicate that Congress intended that a Chapter X court was not to assume or retain jurisdiction over an intrastate utility not subject to regulation by a state commission.[2]

2. Assuming, contrary to the holding of the reorganization court,[3] that the New York Stock Exchange had not complied with the Commission's rules in delisting the stock of the debtor, the court nonetheless was without power to compel the Commission to institute criminal proceedings against the Stock Exchange. The Commission's statutory authority is limited to the referral of evidence concerning possible criminal violations to the Attorney General. See Section 21(e) of the Securities Exchange Act of 1934, *supra*, pp. 2–3. And the power of the Commission with respect to the initiation of enforcement proceedings is not subject to court review. *Crooker* v. *Securities and Ex-*

[2] On his prior appeal, petitioner contended that the court's submission of the plan to the New York Public Service Commission was improper. The court of appeals disposed of this contention by stating (238 F. 2d at 669):

"Appellant also challenges the District Court's approval of the plan on the ground that the Court need not have submitted the plan to the New York State Public Service Commission under Section 178, 11 U.S.C.A. § 578, since that body lacks jurisdiction to establish rates for the debtor corporation. Even if this were true, we fail to see how appellant could have been injured by such submission."

[3] R. 61a–64a. The district court holding was in accord with the view expressed to the court by the Commission.

change Commission, 161 F. 2d 944, 949 (C.A. 1); cf. *Jacobsen* v. *National Labor Relations Board*, 120 F. 2d 96, 99–100 (C.A. 3).

3. Adequate notice in accordance with the provisions of Chapter X was provided throughout the reorganization proceedings of the debtor. On petitioner's prior appeal the court of appeals rejected petitioner's contention that special notice to stockholders of the entry of the order adjudging the debtor insolvent, as distinguished from notice of hearing on the proposed plans of reorganization (see Section 171, 11 U.S.C. 571), was required. 238 F. 2d at 868. As the court of appeals there noted, notice that the common stockholders were not provided for in the trustee's proposed plan of reorganization was given shortly before entry of the order adjudging the debtor to be insolvent. Petitioner has sought to raise the same issues again under the guise of general allegations of fraud on the part of the reorganization trustee and others. The allegations are based simply on affidavits of several stockholders that they did not receive notice, despite evidence in the record (R. 45a–47a, 53a–54a), accepted by the district court (R. 57a), that notice was mailed to all stockholders.[4]

[4] Significantly, the district court charged with the responsibility of conducting these proceedings in reorganization over a number of years specifically found that the common stockholders were "vigorously and capably represented at all hearings where their interests were involved" (R. 57a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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